UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ROSEMARIE OVIAN AND MATTHEW OVIAN,	:	
Plaintiffs,	:	
v.	:	Case No. 2:18-cv-229
GENERAL INSURANCE CO. OF AMERICA AND PROGRESSIVE NORTHERN INSURANCE CO.,	:	
Defendants.	:	

OPINION AND ORDER

Plaintiffs Rosemarie and Matthew Ovian bring claims for breach of contract against Defendants General Insurance Company, d/b/a Safeco Insurance ("Safeco"), and Progressive Northern Insurance Company ("Progressive"). Pending before the Court are cross-motions for summary judgment with respect to the underinsured motorist ("UIM") policy issued by Progressive to Plaintiffs' deceased parents, both of whom died as the result of a motor vehicle accident. Progressive claims that, pursuant to language in its policy, it is entitled to offset payments made by a separate insurer. Plaintiffs argue that the offset/reduction language in the UIM policy is unenforceable because it is contrary to the public policy underlying Vermont's UIM statute, and because it is ambiguous.

In addition to filing for summary judgment, Progressive moves in the alternative for the case to be certified to the Vermont Supreme Court. For the reasons set forth below, Plaintiffs' motion for summary judgment is **denied** and Progressive's motion for summary judgment is **granted**. Progressive's motion for certification to the Vermont Supreme Court is **denied**.

FACTUAL BACKGROUND

This suit arises out of a motor vehicle accident that occurred on December 28, 2016. Sally and Charles Ovian were driving a vehicle that was struck by a pick-up truck. The truck was operated by Ryan Kennelly, and there is no dispute that Mr. Kennelly was at fault. The Ovians died as a result of their injuries. Both deceased individuals' estates ("Estates") incurred various medical bills as a result of the accident. The Ovians are survived by their three adult children: Jeffrey Ovian, Plaintiff Matthew Ovian, and Plaintiff Rosemarie Ovian.

Mr. Kennelly's vehicle was covered under an automobile insurance policy issued by Travelers Property Casualty Insurance Company ("Travelers"). The Travelers policy allowed for up to $250,000 bodily injury liability per person, and up to $500,000 of bodily injury liability per accident. Travelers entered into settlement agreements with the Estates of both Sally Ovian and

Charles Ovian and paid $250,000 to each. Plaintiffs contend that their damages for the wrongful death and survival claims exceed the $250,000 per person and $500,000 combined limit of the Travelers policy.

The Ovians were insured under a primary automobile insurance policy issued by Progressive, and an excess policy issued by Safeco. The Progressive policy states that "an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of bodily injury." It is undisputed that Mr. Kennelly's vehicle meets the definition of an "underinsured motor vehicle" under the Progressive policy and that Plaintiffs are "insured persons." There is also no dispute that the damages in Plaintiffs' wrongful death and survival claims arise out of "bodily injury" under the Progressive policy's terms. The Progressive UIM Policy affords a combined single unit of $500,000 in underinsured motorist insurance benefits. The Safeco policy provides an additional $500,000 of coverage.

The Progressive policy contains an offset provision stating that UIM insurance limits will be reduced by "all sums ... paid because of bodily injury by or on behalf of any persons or organizations that may be legally responsible." Plaintiffs contend that Progressive must treat each Estate's UIM claim

separately when offsetting the sums paid. Calculated that way, the policy's $500,000 UIM insurance benefits would apply to each Estate individually, recovery by each Estate would be reduced by the $250,000 already paid, and Plaintiffs would collect the remaining $250,000 of UIM benefits per Estate. Progressive argues that Travelers' combined payment of $500,000 to both Estates, $250,000 per Estate, should be aggregated and offset from the combined policy limit of $500,000. Under this theory, $500,000 has been paid to the Plaintiffs and the $500,000 UIM coverage has been completely offset.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must show "that there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts "in the light most favorable" to the non-moving party. *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008). If the movant fails to meet his initial burden, the motion will fail even if the opponent does not submit any evidentiary matter to establish a genuine factual issue for trial. *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117

F.3d 674, 677–78 (2d Cir. 1997).

If the movant meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhauser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). In doing so, the opposing party must come forward with sufficient evidence that would justify a reasonable jury in returning a verdict in its favor. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). If "the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact," summary judgment must be denied. *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9–10 (2d Cir. 1983). "Where, as here, there are cross motions for summary judgment, 'each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.'" *Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC*, 628 F.3d 46, 51 (2d Cir. 2010) (quoting *Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121* (2d Cir. 2001).

Also before the Court is the question of certification. Local Rule 74 provides that, "when authorized by state law, the court may certify to the state's highest court an unsettled and significant question of state law that will control the outcome

of a pending case." L.R. 74. "Certification is a discretionary device, both for the certifying court and for the court requested to answer the certified question[s]." *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51 (2d Cir. 1992).

DISCUSSION

Plaintiffs move for summary judgment on the issue of whether the Estates of Charles and Sally Ovian are entitled to each offset the $250,000 sum paid by Travelers, or whether, as Progressive contends, those payments should be combined and considered a complete offset of the $500,000 UIM policy limit. Plaintiffs make two arguments in favor of summary judgment: first, that the policy's "all sums" language is contrary to the public policy underlying Vermont's UM/UIM Statute, and second, that the policy is vague and thus unenforceable. Progressive has filed a cross-motion for summary judgment on both issues.

As discussed below, the ambiguity issue was recently addressed by the Vermont Supreme Court in a case involving similar policy language. At a status conference held before the Court on September 28, 2020, the parties agreed that the ambiguity question no longer requires certification, and counsel for Progressive opined that the public policy issue does not clearly present a novel question under Vermont law. The Court therefore **denies** Progressive's motion to certify.

I. Public Policy

In their motion for summary judgment, Plaintiffs submit that Progressive's position is contrary to the purpose of Vermont's UM/UIM statute, 23 V.S.A. § 941(f). They rely in part upon the Vermont Supreme Court's ruling in *Progressive Cas. Ins. Co. v. MMG Ins. Co.*, 2014 VT 70, ¶ 11 (2014) (hereinafter "*Progressive*"), which interpreted the Vermont legislature's amendment of Section 941(f). Under the pre-amendment statute, when a negligent party's liability coverage equaled or exceeded the injured party's UIM coverage, the injured party would be denied UIM coverage because the liable party was not under-insured. This approach is known as a "limits to limits" comparison. *Progressive*, 2014 VT 70, ¶ 1. In *Colwell v. Allstate Ins. Co.*, 2003 VT 5, ¶¶ 12–13, the Vermont Supreme Court recognized that an "anomoly" can occur when the liable party has a policy limit equal to or exceeding the injured party's UIM limit, but is forced make payments to multiple victims. As a result of those multiple payments, the injured insured might recover less than the limit of his or her UIM policy.

> Because the law at that time required a strict "limits to limits" comparison, a party could be denied the benefits of a UIM policy that he purchased even though he did not recover the "limits" of a tortfeasor's liability policy. Thus, in some multi-victim cases, a party was better off if injured by an uninsured, rather than underinsured, tortfeasor. Given the plain

> language of the statute, we left it to the Legislature to decide whether, and how, to address this issue. *Id.* ¶ 15. The Legislature responded by amending 23 V.S.A. § 941(f) to specifically address UIM recovery in multi-victim accidents.

Progressive, 2014 VT 70, ¶ 1. Section 941(f), as amended by the Vermont legislature in 2005, now reads:

> For the purpose of this subchapter, a motor vehicle is underinsured to the extent that:
>
> (1) the liability insurance limits applicable at the time of the accident are less than the limits of the uninsured motorist coverage applicable to the insured; or
>
> (2) the available liability insurance has been reduced by payments to others injured in the accident to an amount less than the limits of the uninsured motorist coverage applicable to the insured.

23 V.S.A. § 941(f).

According to Plaintiffs, the amended UIM statute requires that an injured party be permitted to recover full UIM benefits when a tortfeasor's liability insurance has been depleted by payments to other victims. Rather than a strict limits-to-limits analysis, the law now requires consideration of how much the injured party has recovered, and a comparison of that amount to the limit of the injured party's UIM policy. The Court agrees with this portion of the Plaintiffs' analysis. Under the amended statute, a tortfeasor may be considered underinsured when payments made to multiple injured parties result in an insured

party receiving less than the limit of his or her UIM policy. The amended statute offers little insight, however, on the question presented here: whether two insureds under a single UIM policy may consider their payments from the liable party separately, or whether those payments can be aggregated when determining the amount to be paid under the UIM policy.

Plaintiffs submit that each Estate should be considered separately. For support, they cite the Vermont Supreme Court's endorsement of an "excess coverage" approach. In general, that approach "deems a tortfeasor underinsured when the injured party's damages exceed the tortfeasor's liability coverage." *Progressive*, 2014 VT 70, ¶ 13. As explained by the Vermont Supreme Court, "[a] variant of this [excess coverage] approach 'requires insurers to provide UIM coverage to the extent that the amount actually available to the injured party from the tortfeasor's policy was less than the UIM coverage limits stated in the injured party's policy.'" *Id.*, ¶ 13 (quoting *Colwell*, 2003 VT 5, ¶ 13). That "variant" approach is now codified in 23 V.S.A. § 941(f)(2).

Plaintiffs argue that under the "excess coverage" approach, each Estate is entitled to recover the difference between the amount it received ($250,000) and the UIM policy limit ($500,000). Progressive argues for adherence to the terms of the

UIM policy, which allows an offset by "all sums" paid. In this case, "all sums" paid totaled $500,000. Plaintiffs contend that the phrase "all sums" cannot be read literally, and that doing so would be directly contrary to the express language of Section 941(f) and the purposes of excess coverage. They argue that a straightforward reading of "all sums," regardless of the number of third-party victims or claims made, could result in a loss of benefits even if an insured did not receive the limit of an applicable UIM policy. Plaintiffs further argue that someone insured under a UIM policy could end up receiving no benefits if a third-party's damages were far greater than the insured's.

Plaintiffs' multiple third-party victims scenario is not before this Court. Nor is this a case of multiple claimants with multiple UIM policies. Here, there was a single policy with a combined $500,000 limit. As a result of the accident, the Estates received $500,000 from the tortfeasor's insurer. Progressive now seeks to offset the UIM limit by the amount of that collective recovery.

Plaintiffs concede that their position would afford the two Estates more coverage than the UIM policy provides. As noted in their briefing, "the result they request in this Declaratory Judgment would afford more total coverage, i.e., $1,000,000 for the Estates as compared to the $500,000 which would be available

to split between the Estates if only the UIM coverage was available." ECF No. 27-7 at 11 n.1. They nonetheless argue that such a result is consistent with the "excess coverage" approach, and that "an insurance policy can provide coverage in excess of statutory and case law requirements." *Id.* On this fundamental point, the Court disagrees.

The scenario presented by Plaintiffs is instructive. Assuming that the tortfeasor had made no payment at all, the two Estates would be entitled to a combined total of $500,000 in UIM insurance from Progressive. *See id.* Considering the payments actually made by Mr. Kennelly's insurer, the Estates still received $500,000. Nothing in that result is inconsistent with the "variant" of the "excess coverage" approach as described by the Vermont Supreme Court. As made clear by the ruling in *Progressive*, "UM/UIM policies are not intended by the statute to increase the overall amount of recovery, but to restore the insured to the position he would have been in had the other driver carried equally responsible insurance coverage." 2014 VT 70, ¶ 26 (quoting *Hubbard v. Met. Prop. & Casualty Ins. Co.*, 2007 VT 121, ¶ 9). In other words, nothing in Section 941(f) is intended to increase the amount of recovery *beyond* the limits of

the UIM policy.[1]

With enforcement of the "all sums" provision in the Progressive policy, Plaintiffs are put in the same position as if the tortfeasor had been uninsured. Consequently, the "anomoly" that gave rise to amending Section 941(f) is not presented here. *See Progressive*, 2014 VT 70, ¶ 13. Plaintiffs' contention that the amended statute allows recovery above the limits of the UIM policy goes beyond anything stated in either Section 941(f) or the post-amendment case law.

Together with the Safeco policy, the Ovians had $1 million in coverage available to them. They were injured in the same accident, and their Estates may still be eligible to receive a combined total of $1 million in insurance payments. Nothing in that result frustrates either Vermont's UIM statute or the underlying public policy. The Court therefore finds in favor of Progressive on this issue.

II. Ambiguity

Although Plaintiffs also contend that the "all sums" clause

[1] Plaintiffs focus in part on the Vermont Supreme Court's general statement that "the purpose of our UM/UIM statute . . . is to provide the prudent motorist with maximum insurance coverage when involved in an accident with a marginally insured (or uninsured) motorist." *Progressive*, 2014 VT 70, ¶ 11. The Court notes that "maximum insurance coverage" must be distinguished from maximum recovery, and that Plaintiffs are arguing for a recovery beyond the extent of their insurance coverage.

cannot be enforced because it is ambiguous, the Vermont Supreme Court recently resolved that question in *Muller v. Progressive Northern Insurance Company*, 2020 VT 76. The policy in *Muller* had the same offset/reduction clause at issue here. The insureds, as in this case, were two individuals covered by the same UIM policy and injured in the same motor vehicle accident. The UIM policy provided a combined single limit of $300,000, and each insured received $100,000 from the under-insured tortfeaster. The issue presented to the Vermont Supreme Court was whether the "all sums" clause in the policy meant that the two $100,000 payments were to be combined, in which case the insureds would receive an additional $100,000 from their UIM policy, or considered separately, in which case the insureds would receive $200,000 from their UIM policy. Progressive filed a declaratory judgment action to clarify its obligation.

The Mullers argued that the "all sums" clause was ambiguous because it did not make clear how to apply setoffs when there are multiple underinsured motorists claiming under a single policy. The Vermont Supreme Court held that "the setoff provision is not ambiguous. The various provisions of the policy make clear that Progressive is entitled to reduce 'all sums ... paid because of bodily injury' regardless of the number of claims made." *Progressive*, 2020 VT 76, ¶ 18. Accordingly, the amounts paid by

the tortfeasor's insurer could be aggregated, and the Mullers were only entitled to recover $100,000 under the UIM policy.

In light of *Muller* the Court finds that, as a matter of Vermont law, the policy in this case is not ambiguous. The two claimant Estates were each paid $250,000 by the tortfeasor's insurer, and the "all sums" clause in the Progressive policy allows those amounts to be aggregated. Because the UIM policy is not ambiguous, the policy limit of $500,000 may be completely offset.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment (ECF No. 27) is **denied**, Progressive's motion for summary judgment (ECF No. 28) is **granted**, and Progressive alternative motion for certification (ECF No. 28) is **denied**.

DATED at Burlington, in the District of Vermont, this 30th day of September, 2020.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge